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No. 91-45

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT M. GIRARD AND THOMAS J. DEEF, PETITIONERS

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an administrative law judge must preside over debarment proceedings conducted pursuant to the Federal Acquisition Regulations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-19a) is reported at 930 F.2d 738. The opinion of the district court (Pet. App. 20a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1991. The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the president and sales manager of United Dairymen of Arizona (UDA), an agricultural cooperative. Since 1982, the Commodity Credit Corporation (CCC) has purchased cheese from UDA under the Federal Price Support Program. That program is administered by the Agricultural Stabilization and Conservation Service (ASCS) of the United States Department of Agriculture (USDA). Pet. App. 8a.

In 1985, CCC discovered that some of the cheese it had purchased from UDA as "barrel cheese" was in fact "block cheese," which was ineligible for the program under which it was purchased. In May 1985, following a preliminary investigation by the USDA's Office of Inspector General, ASCS's Deputy Administrator for Commodity Operations, Ralph Klopfenstein, suspended UDA from selling cheese to the government for 18 months pending further investigation. Pet. App. 8a-9a.

In May 1988, following an additional investigation by the Office of Inspector General, Klopfenstein notified petitioners that the USDA proposed to debar them from participating in government contracts for two years. The notification letter advised petitioners that they could challenge the proposed debarment at a hearing before an ASCS official. Pet. App. 9a, 32a-34a.

Petitioners demanded that ASCS provide them with a formal hearing before an administrative law judge. Klopfenstein refused this demand on the ground that debarment proceedings are governed by regulations that do not provide for a formal hearing before an ALJ. Instead, Klopfenstein informed petitioners that he would serve as the debarring official (the official

who presides over a debarment hearing), and gave petitioners 30 days to propose a date for the hearing. Pet. App. 9a, 34a-38a.

Petitioners then filed an action in district court seeking a declaratory judgment that the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. 554, entitle them to a formal hearing before an ALJ. The district court granted respondents' motion for summary judgment. Pet. App. 20a-31a. The district court held that due process does not require a formal hearing before an ALJ. *Id.* at 22a-31a. In addition, the court concluded that petitioners were required to exhaust their administrative remedies before bringing an action in district court. *Id.* at 30a-31a.

2. The court of appeals affirmed. Pet. App. 7a-19a. The court of appeals disagreed with the district court's conclusion that petitioners were required to exhaust their administrative remedies. *Id.* at 11a-12a. But the court of appeals agreed with the district court that petitioners were not entitled to a hearing before an ALJ. The court of appeals first considered (*id.* at 13a-14a) petitioners' argument that 5 U.S.C. 554, part of the Administrative Procedure Act (APA), requires that debarment hearings be conducted by an ALJ. The court rejected that contention because Section 554(a) states that the APA requirements apply only to "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing," and USDA debarment hearings are not "required by statute," but by the Federal Acquisition Regulations. The court of appeals also rejected petitioners' argument that the Due Process Clause requires that an ALJ preside over the debarment proceeding. The court observed that a Federal Acquisition Regulation, 48 C.F.R. 9.406-3, provides con-

tractors with several procedural rights, including an opportunity to appear at an informal hearing prior to debarment, to be represented by counsel, and to call witnesses. Pet. App. 15a. Applying the balancing analysis of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court concluded that these procedures satisfy the requirements of the Due Process Clause. Pet. App. 15a-18a. The court further rejected petitioners' argument that a hearing before an ALJ is required by this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 modified, 339 U.S. 908 (1950). In *Wong Yang Sung*, the court noted, the statute at issue had been construed to require a hearing, whereas in this case the hearing is required by regulation. Pet. App. 17a. In addition, the court observed, "the debarring officer is not a member of the investigative branch of the agency," and the regulations "do not merge the functions of prosecutor and decisionmaker." [1] *Ibid.*

ARGUMENT

Petitioners contend (Pet. 5-12) that an ALJ must preside at their debarment hearing, not a USDA employee who was involved in the investigation of their case or the decision to initiate debarment proceedings. That contention merits no further review.

1. The Due Process Clause does not require strict separation of adjudicative and investigatory functions. In *Withrow* v. *Larkin*, 421 U.S. 35 (1975),

[1] The court also ordered that petitioners' claims against Klopfenstein be dismissed. After petitioners filed their notice of appeal, Klopfenstein resigned from the ASCS. "Thus," the court explained, "any issue regarding his ability to serve as an impartial debarring officer has become moot." Accordingly, the court ordered that the judgment with regard to Klopfenstein be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Pet. App. 18a-19a.

the Court rejected a due process challenge to a state medical licensing board that both investigated and adjudicated allegations of professional misconduct. As the Court observed, the contention that due process forbids the combination of investigative and adjudicative functions has "been squarely rejected in prior decisions of this Court." 421 U.S. at 47. See *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). In *Withrow*, the Court explained that such constitutional objections "must overcome a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. Accordingly, the courts of appeals have rejected due process attacks on the debarment regulations. See *Transco Security, Inc.* v. *Freeman*, 639 F.2d 318, 321-323 (6th Cir.), cert. denied, 454 U.S. 820 (1981); *ATL, Inc.* v. *United States*, 736 F.2d 677, 682-683 (Fed. Cir. 1984).[2]

Nor does the APA, 5 U.S.C. 554, provide petitioners with a right to a hearing before a debarment officer who played no role in the investigation or decision to initiate debarment proceedings. To be sure, Section 554(d) provides that an agency employee who "engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision * * * except as witness or counsel in

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[2] Moreover, since Deputy Administrator Klopfenstein has resigned from the ASCS, there is no possibility that Klopfenstein will act as the debarring officer. Although an ALJ will not preside at the debarment hearing, there is no reason to assume that the official who ultimately is appointed to serve as the debarring officer in petitioners' case will have participated in the investigation of petitioners or the decision to initiate debarment proceedings against them, as Klopfenstein did.

public proceedings." 5 U.S.C. 554(d). But Section 554 applies, with certain exceptions not relevant here, only to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). Debarment hearings are not "required by statute." Instead, the right to a hearing in a debarment proceeding, and the procedures for such hearings, are established by a Federal Acquisition Regulation, 48 C.F.R. 9.406. Consequently, the APA, by its own terms, does not apply to the debarment proceeding at issue in this case.[3]

2. Petitioners nevertheless contend, relying on this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950), that "§ 554 of the APA applies to agency adjudication where liberty or property interests protected by procedural due process are implicated," even if the adjudication is not "required by statute" within the meaning of Section 554. Pet. 4. That novel proposition, if accepted, would invalidate a wide variety of informal adjudicatory arrangements by federal agencies, even though this Court has held that the requirements of the Due Process Clause are satisfied in many contexts by informal procedures short of a full trial-type hearing. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); 2 K. Davis, *Administrative Law Treatise* § 10:8, at 336-337 (2d ed. 1979) (APA does not forbid "truncated" hearings that meet requirements of due process).

Contrary to petitioners' assertions, *Wong Yang Sung* does not support their position. In that case, the Court held that the deportation hearings at issue came within Section 554 because "the requirement

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[3] Of course, once the agency renders a final debarment decision, that decision is judicially reviewable under the APA. See 5 U.S.C. 701-706.

for [hearings] has been read into a statute by the Court in order to save the statute from invalidity." 339 U.S. at 50.[4] Because the deportation statute, as construed by the Court, was the source of the right to a hearing, it followed that the hearings were "required by statute" within the meaning of Section 554(a). In this case, in contrast, no statute affords a right to a debarment hearing. Rather, the right to a hearing is based entirely on a Federal Acquisition Regulation. And there is no occasion to read such a hearing requirement into any statute, since the agency provides a hearing under the regulation that fully satisfies the requirements of the Due Process Clause.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The Court had so read the governing statute in *The Japanese Immigrant Case*, 189 U.S. 86, 99-101 (1903).

[5] There is no basis for petitioners' contention (Pet. 10) that the decision in this case is in "sharp contrast with" *Leitman* v. *McAusland*, 934 F.2d 46 (4th Cir. 1991). In *Leitman*, the court did not reach the question whether debarment hearings are subject to 5 U.S.C. 554, but instead determined that the hearing at issue was conducted in compliance with that provision.

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